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No. 88-2098

In the Supreme Court of the United States

October Term, 1988

TOWNSHIP OF PARKS,

Petitioner,

v.

BABCOCK & WILCOX COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

David L. McClenahan
Michael J. Lynch
Kenneth M. Argentieri

KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, Pennsylvania 15222
(412) 355-6500

Counsel for Respondent
Babcock & Wilcox Company

July 28, 1989

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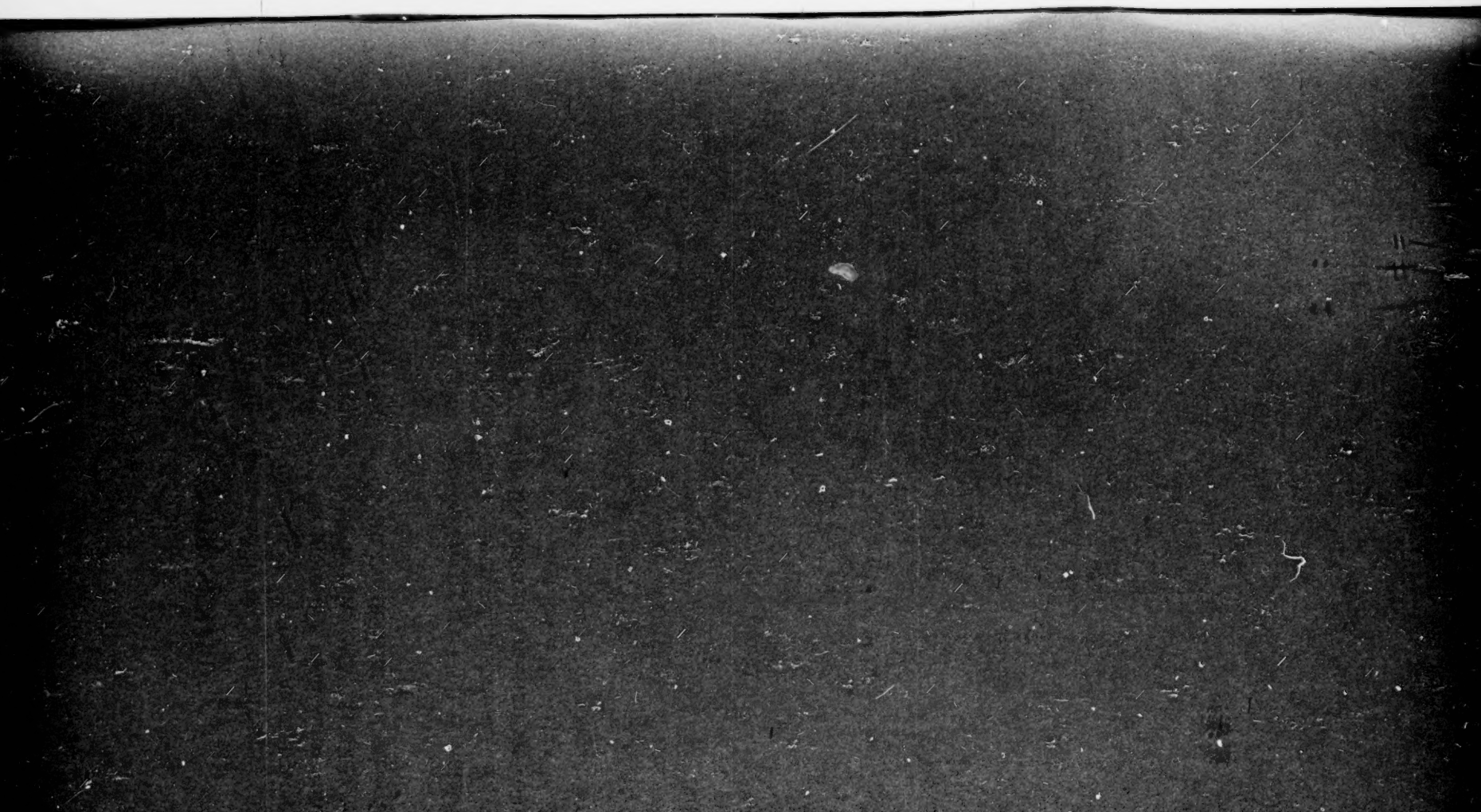

QUESTIONS PRESENTED

I. Does a judgment order issued by the United States Court of Appeals for the Third Circuit, which affirms the district court's discretionary decision to grant the plaintiff's motion for voluntary dismissal without prejudice under Fed.R.Civ.P. 41(a)(2), constitute a decision that "conflicts" with the decisions of other Courts of Appeals?

II. Does a judgment order issued by the United States Court of Appeals for the Third Circuit, which affirms the district court's discretionary decision to grant the plaintiff's motion for voluntary dismissal without prejudice under Fed.R.Civ.P. 41(a)(2), depart from the accepted and usual course of judicial proceedings?

III. Does a judgment order issued by the United States Court of Appeals for the Third Circuit, which affirms the district court's discretionary decision to grant the plaintiff's motion for voluntary dismissal without prejudice under Fed.R.Civ.P. 41(a)(2), present an important question of federal law that should be settled by this Court?

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I. COUNTER STATEMENT OF THE CASE

A. Introduction

By its Petition for Writ of Certiorari (the "Petition"), the Township of Parks (the "Township") requests that this Court review the appellate court's summary affirmance of the district court's discretionary decision to grant Respondent Babcock & Wilcox Company's ("B&W") motion for voluntary dismissal without prejudice pursuant to Fed.R.Civ.P. 41(a)(2) ("Rule 41(a)(2)"). The Township asserts that review is appropriate, even though the district court applied well established Rule 41(a)(2) principles in making its decision, even though the district court imposed a series of conditions on the dismissal to protect the Township from any legal prejudice and even though the Township is incapable of identifying any actual harm that it has incurred as a consequence of this action.

Cutting through the numerous accusations of judicial error and impropriety, the real engine driving the Petition is the Township counsel's desire to collect his attorneys' fees from B&W. Given the history of this case and applicable Rule 41(a)(2) principles, the district court correctly decided that the imposition of attorneys' fees was inappropriate. The United States Court of Appeals for the Third Circuit ("Third Circuit") agreed.

The Township is unable to proffer a single persuasive argument as to why the lower courts' decisions were in error. The Township is simply dissatisfied with the result. That dissatisfaction is not sufficient to obtain a writ of certiorari from this Court. B&W respectfully requests that this Court deny the Petition.

B. Background Of This Action

The issues giving rise to the Petition have their origin in the efforts of the Township to prevent B&W[1] from establishing a Volume Reduction Services Facility ("VRSF") at B&W's plant in Parks

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[1]Pursuant to Rule 28.1 of this Court, B&W states that its parent company is McDermott, Inc., which, in turn, is a subsidiary of McDermott International, Inc. B&W's affiliates and subsidiaries (other than wholly owned subsidiaries) are Diamond Power Specialty Limited, Especialidades Termomecanicas S.A. de C.V., Babcock & Wilcox Services, Inc., Bailey Japan Company Limited, KBW Gasification Systems, Inc. and PowerSafety International, Inc.

Township, Pennsylvania. The purpose of the VRSF was to reduce in size low level radioactive waste materials in preparation for transportation and burial at sites located elsewhere in the United States. R. 11-12, 1015-16.[2] These materials were to include contaminated tools, clothing, paper and other waste generated from sources such as hospitals, medical research institutions and industrial operations. R. 1015-16. The proposed VRSF had two principal components: a supercompactor that would reduce the volume of waste material through physical compaction and an incinerator that would eliminate waste through a controlled incineration process. R. 1016.

After B&W announced its intention to establish the VRSF, a group of Township citizens became concerned that the VRSF would pose a health hazard. R. 1619-1620. In response to that group's concerns, the Township enacted Ordinance No. 9-16-85 (the "Ordinance") in September 1985. R. 26-29(a). The Ordinance, while adopting federal and state emission standards for all other radioactive substances, prohibits emissions of more than five curies per year of hydrogen-3 and one curie per year of carbon-14. R. 27. These restrictions are significantly more stringent than existing federal and state standards. R. 13, 1025. Moreover, they are substantially more restrictive than is necessary to protect public health and safety under even the most conservative reasonable analysis. R. 1019-1020, 1027, 1029-1030.

The Ordinance also limits emissions of dioxins to "30 parts per trillion (per cubic meter of air)." R. 27. This standard is scientifically incomprehensible because it states a limit in terms of a concentration per unit volume, a restriction which is dimensionally nonsensical. R. 1141-1142. Further, the Ordinance fails to provide other information essential to interpreting the dioxin limitations. R. 1142-1146.

As intended by the Township, the Ordinance's emission standards effectively prohibited the operation of the VRSF as planned. R. 14, 1016-1017. Following passage of the Ordinance, B&W requested information regarding the statute's terms and monitoring standards. R. 30-31. The Township refused to provide that information. R. 1597-98. B&W filed this action on December 31, 1985.

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[2]Citations to the Joint Appendix and Supplemental Appendix filed in the Third Circuit are referred to herein as: "R. ___."

B&W's Complaint asserts that the Ordinance, although purporting to establish emission standards of general applicability to promote the public health and safety, was actually designed for the sole purpose of preventing B&W's VRSF from operating (R. 16); that the Ordinance's emission standards, in fact, bear no rational relationship to public health and safety and, therefore, violate the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. §1983 ("§1983") (R. 18); that the Ordinance effects a taking of B&W's property without just compensation in violation of the Fifth Amendment and §1983 (R. 11-12);[3] that the Ordinance places an undue burden upon interstate commerce in violation of the Commerce Clause (R. 21); and that the Ordinance is preempted by the Atomic Energy Act and the Supremacy Clause (R. 22-23).[4]

The Township moved to dismiss B&W's complaint. R. 32-55. On May 12, 1986, the district court denied the Township's motion, holding that each of B&W's claims stated a proper cause of action. R. 56-67. The Third Circuit subsequently denied the Township's petition for interlocutory appeal of that decision. *Babcock & Wilcox Co. v. Township of Parks,* No. 86-8034 (3rd Cir. August 4, 1986).

C. Discovery

After filing the Complaint, B&W sought to depose the Township Supervisors who are responsible for administering and enforcing the Ordinance. Toward this end, B&W served subpoenas *duces tecum* upon the Supervisors. In response, the Township filed a motion to quash. From the filing of that motion in January 1986, until B&W filed its motion for voluntary dismissal over two years later, virtually the entire action before the district court was consumed by the Township's efforts to prevent B&W from taking the Supervisors' depositions. Toward this end, the Township filed *twenty-three* motions and briefs, including various appeals, applications and petitions to the

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[3]B&W's Complaint also asserts that the Ordinance violates the Due Process and Just Compensation Clauses of the Pennsylvania Constitution and is preempted under Pennsylvania law. R. 18-19, 20, 23-24.

[4]The Petition asserts that B&W's Complaint is based on an "alleged property right to emit . . . hazardous air pollutants." The assertion is pure fiction. To the contrary, the Complaint explicitly asserts B&W's right to operate its property within applicable federal and state limits and in a way that would pose no threat to the public. R. 15.

Third Circuit, to prevent those depositions. R. 1437-1442. The Township's claim was that B&W sought to harass the Supervisors and to intrude upon their alleged legislative immunity.

The district court repeatedly rejected both of the Township's claims. In rejecting the Township's unfounded legislative immunity argument, the court recognized that "the Supervisors wear more than one hat. On the one hand, they serve as legislators and thus enjoy legislative immunity for their 'legislative activities.' On the other, they are responsible for administering and enforcing the very laws they enacted in their role as legislators." R. 685. The court concluded that B&W's deposition questions were properly directed to the Supervisors in their latter capacity. R. 682-683.

The district court also explicitly rejected the Township's claims of harassment:

> [The Township's] *contention that B&W's sole purpose in deposing the Supervisors was to oppress and harass them is without merit.* As has been indicated, the specific questions which the Supervisors refused to answer are both relevant and not protected by any privilege. *Parks Township has not shown that the Supervisors were harassed or oppressed by the asking of those questions.* R. 685-686 (emphasis supplied).

Notwithstanding repeated orders from the district court directing the Supervisors to answer B&W's questions,[5] the Township continued to use every conceivable procedural device to prevent B&W from taking any meaningful discovery. As a consequence of these factors,

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[5]On October 16, 1986, the district court rejected the Township's various motions to quash the subpoenas *duces tecum* and ordered the Supervisors to appear for their depositions. R. 213-218. On January 5, 1987, the Supervisors were deposed. In direct disobedience of the court's order, the Supervisors, at the direction of the Township's counsel, refused to answer over 150 questions concerning the administration and enforcement of the Ordinance. *See, e.g.*, R. 330, 334-335, 340, 377-378. On June 4, 1987, the court held that the Supervisors' refusal to answer was improper and directed them again to answer the questions. R. 687. The Township then filed various appeals and writs with the Third Circuit to prevent the depositions. R. 696, 871-889, 923-928, 970-975. The Third Circuit denied each of these appeals and writs. When the Supervisors finally reappeared for their depositions on August 6, 1987, they testified that they could not answer B&W's questions because the Township's counsel, not they, was responsible for

(Continued on next page)

B&W still had been unable by the fall of 1987 to obtain basic information regarding the meaning and the enforcement of the Ordinance.[6]

D. B&W'S Decision To End This Litigation

By the fall of 1987, twenty months after this action had begun, B&W was incurring substantial carrying charges regarding the VRSF; B&W had spent an enormous sum responding to the Township's numerous obstructive and meritless pleadings in opposition to B&W's discovery efforts; B&W had won virtually every substantive decision before the district court and the Third Circuit; and yet, the Township continued to prevent B&W from obtaining basic information regarding the interpretation and administration of the Ordinance. Further, given the Township's penchant for filing unfounded pleadings, it was clear that continuation of this lawsuit would be extremely expensive.

It was also becoming increasingly apparent that a victory by B&W in this action would be a hollow one. B&W had filed an application for an air quality permit for its VRSF with the Pennsylvania Department of Environmental Resources ("DER") in November, 1984 with the understanding that DER would act on it promptly. As of the fall of 1987, the DER still had made no decision. Further, DER indicated that it was reluctant to make a ruling with respect to the incinerator portion of the VRSF because of the Township's concerns. R. 1449-1450.

Given the enormous delay and expense to which the Township had put B&W in this litigation, given that continuation of the lawsuit would cause B&W to incur even more costs and given that the DER

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administering the Ordinance. *This testimony was directly contrary to the Supervisors' sworn testimony in January 1987, a year after the date of Township counsel's alleged appointment, that they themselves were the Ordinance's administrators.* R. 976-1012.

[6]The Township's repeated cry that B&W commenced this action to impose large litigation costs on the Township is refuted by the limited discovery efforts of B&W. Specifically, the only discovery that B&W took during this entire action was four depositions, consisting of less than four working days. Given the constitutional claims in issue, the Township's suggestion that such discovery was done to harass the Township through expensive litigation is ludicrous.

appeared unwilling to act on the permit application for the incinerator, B&W decided to abandon the incinerator, to get the supercompactor licensed and to settle this action with the Township as quickly as possible to avoid further litigation expenses.[7] In light of the Township's prior lack of concern about the supercompactor portion of the VRSF,[8] B&W believed that a mutually advantageous settlement could be reached promptly. B&W was wrong.

From October, 1987 through January, 1988, B&W attempted to reach a reasonable settlement with the Township. B&W's settlement efforts included multiple negotiation sessions between counsel, pretrial conciliations, telephone conversations with District Court Magistrate Robert C. Mitchell (the "Magistrate") and the exchange of multiple settlement drafts and correspondence. Throughout this period, the Township's counsel told B&W that this action could not be settled unless B&W paid his alleged attorneys' fees, while all the time refusing to permit B&W representatives to negotiate directly with the Supervisors. As a result, no reasonable settlement could be reached.

E. B&W'S Motion For Voluntary Dismissal Without Prejudice

Having attempted and failed to settle this matter, B&W filed its motion for voluntary dismissal without prejudice on February 1, 1988. R. 1336-44. In response to B&W's motion, the Township filed a

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[7]Contrary to the Township's assertions, B&W did not move to dismiss this case from fear of the motion for summary judgment filed by the Township. The Township's motion was fatally defective. It was based on facts asserted in affidavits that were directly refuted by affidavits filed by B&W. Further, the Township's experts who had filed supporting affidavits were persons whose credibility had been questioned by various courts and administrative agencies. Finally, the motion was premised on various misstatements as to the appropriate legal standards to be applied to B&W's claims. Thus, the Township's motion presented B&W with no incentive to dismiss this action, other than to avoid one more set of unnecessary legal expenses required to defeat another specious Township motion.

[8]The Township had previously indicated that it had no significant concerns regarding the supercompactor. The Township had already granted B&W a provisional certificate under the Ordinance to operate the supercompactor. R. 1444-45. In addition, the Supervisors had indicated in their depositions that it was the incinerator, not the supercompactor, about which the Township was concerned. "We have no quarrel with the emissions from the compactor and we have issued them a permit." *See* R. 1601.

39 page document entitled "Suggestions for Conditions in Response to Plaintiff's Notice for Voluntary Dismissal Without Prejudice" (the Township's "Suggestions"). R. 1345-1392. The Township therein argued that the court should either (1) dismiss this action with prejudice and require B&W to pay the Township's litigation expenses and taxable costs; or (2) dismiss this action without prejudice conditioned upon (i) B&W's payment of all of the Township's attorneys' fees, costs and expenses; (ii) B&W's compliance with all of the Township's discovery requests; and (iii) an order prohibiting B&W from taking duplicative discovery from the Township in the future.

As with the Township's other pleadings, the Suggestions were predicated largely on unfounded claims that B&W had acted in bad faith in this litigation. B&W responded to the Township's Suggestions on April 1, 1988 (B&W's "Response"). R. 1393-1448. B&W's Response provided a detailed history of this action, addressing and refuting the Township's multiple claims of bad faith. R. 1393-1415. Further, B&W's Response delineated the fundamental flaws in the Township's demands. B&W's Response further explained that the Township's suggested conditions on a dismissal without prejudice were neither necessary to protect the Township from legal prejudice nor appropriate in the circumstances of this case. R. 1426-1434.

On April 25, 1988, Magistrate Mitchell held oral argument on B&W's Rule 41(a)(2) motion. *See* Docket Entry No. 100. R. 8. The Township's counsel presented a lengthy argument in opposition to B&W's motion and in support of the Township's proposed conditions. The Township's counsel also requested and was granted permission to file an additional brief opposing B&W's motion. The Township filed another 47 page opposition brief on May 5, 1988. R. 1458-1505. That brief, like its predecessor, failed to provide any persuasive support for denying B&W's motion or imposing the Township's demanded conditions.

On May 19, 1988, the Magistrate issued a Report and Recommendation (the "Report") in response to B&W's motion for voluntary dismissal without prejudice. A6-A16.[9] In the Report, the Magistrate recommended that this action be dismissed without prejudice

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[9]Citations to the Appendix filed by the Township with its Petition are referred to herein as "A ___."

subject to five conditions "designed to ensure that the Township's efforts to this point, will not have been in vain if in fact the Ordinance is ever again challenged by the plaintiff." A13. These conditions included ordering B&W never to install the incinerator portion of its VRSF in the Township; requiring B&W to conduct all of its present and future operations in the Township in compliance with the emission standards of the Ordinance; precluding B&W from objecting to the reuse of any discovery obtained in this suit in subsequent litigation between the parties; and directing B&W to pay all of the Township's costs exclusive of counsel fees. *See* A3-A4.

The Township filed a 56 page brief containing objections to the Report on June 4, 1988. A25-114. Like those before it, this brief provided no colorable statement of legal prejudice which the Township would suffer from the dismissal without prejudice nor any credible reason why the Township's proposed conditions were necessary to protect it.

On June 20, 1988, the district court filed an order adopting the Magistrate's Report and granting B&W's motion for voluntary dismissal without prejudice subject to the five conditions recommended by the Magistrate. A1-4. The court specified that its order was based upon an independent review of the pleadings, including the Township's objections, and the Magistrate's Report. On September 26, 1988, the district court awarded the Township $2,380.30 in costs pursuant to its June 20, 1988 order.

On July 19, 1988, the Township filed its appeal to the Third Circuit. The appeal was based upon the same incorrect statements of law and false factual allegations that the Township argued to the district court. On December 13, 1988, the Third Circuit affirmed the district court's order by issuing a one sentence Judgment Order. A22-23. The Township then petitioned the Third Circuit for rehearing *in banc*. The Third Circuit denied the petition on May 25, 1989. A23-24.

II. ARGUMENT

A. Standards For Review Of The Petition

Rule 17 of the Rules of the Supreme Court sets forth the considerations governing review of a petition for writ of certiorari. The

foremost principle guiding the Court's consideration is that such a petition should be granted "only when there are special and important reasons therefor." Rule 17.1; *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Thus, the Court will not grant certiorari "except in a case involving principles, the settlement of which is of importance to the public, as distinguished from that of the parties." *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951), citing *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). Further, a writ will not be granted if the issue merely involves the application of well settled principles to disputed facts. *Id.*

The determination as to whether a petition presents the requisite special and important reasons for review is a matter of judicial discretion. Rule 17.1; *see also Heckler v. Edwards*, 465 U.S. 870, 876 (1984). However, Rule 17 sets forth various factors that the Court will consider in making this determination. The Township attempts to characterize its claims as falling within the ambit of three of these factors. Specifically, the Township argues that the Third Circuit's decision is in conflict with the decisions of other Circuits (Rule 17.1(a)); that the lower courts so far departed from the accepted and usual course of judicial proceedings as to require the Court to exercise its power of supervision (Rule 17.1(a)); and that the Third Circuit's affirmance presents an important question of federal law which has not been, but should be, settled by the Court. (Rule 17.1(c)).

The Township's Petition fails to present any issues which would warrant the Court's review under the standards of Rule 17. Cutting through the baseless claims of impropriety and the mischaracterizations of the record, the Petition seeks to have this Court reverse the Third Circuit's summary affirmance of the trial court's discretionary decision to grant B&W's motion to dismiss this action without prejudice. As discussed below, those decisions were made by applying well settled principles developed by the courts under Rule 41(a)(2). Consequently, the lower courts' decisions do not conflict with decisions of other Circuits; were not the product of any departure from accepted and usual judicial procedure; and do not present any important question of federal law which requires resolution by this Court.

B. The Third Circuit's Decision Does Not Conflict With The Decisions Of Other Courts Of Appeals

One reason often cited by this Court for granting certiorari is that the decision for which review is sought conflicts with decisions of other Courts of Appeals on the same subject. *See, e.g., Carnegie Mellon University v. Cohill,* 484 U.S. 343 (1988). The Township seeks certiorari in this case by broadly claiming that the Third Circuit's Judgment Order conflicts with "the Rule 41 principles developed in every other Circuit that has addressed these issues." Petition at 46. That claim has two fatal flaws. One, the Third Circuit's summary affirmance is incapable of creating a conflict with the decisions of any other Courts of Appeals. Two, the district court's decision affirmed by the Third Circuit applied well established Rule 41(a)(2) principles in granting B&W's motion to dismiss. Thus, no conflict exists within the meaning of Rule 17.1(a) and the precedents of this Court.

1. The Judgment Order Cannot Create a Conflict with Other Circuits' Decisions

The Third Circuit ruling for which the Township seeks review is a one sentence Judgment Order affirming the district court's decision. The Third Circuit did not issue an opinion setting forth its rationale for affirmance; the Third Circuit did not state that it was adopting the reasoning of the district court. Under these circumstances, no decision that could possibly "conflict" with any other Courts of Appeals' decision exists.

Specifically, the courts have repeatedly stated that a judgment order does no more than affirm the decision on appeal. *See, e.g., Airco Industrial Gases, Inc. v. Teamsters Health & Welfare Pension Fund,* 850 F.2d 1028 (3d Cir. 1988). A judgment order is not intended to, and does not, set forth the principles of law or analysis that the Court of Appeals applied in reaching its decision. As stated by the Third Circuit, "[a] judgment order of this court affirming a judgment of the district court signifies that we have found no error in the result reached, not that we necessarily adopt the rationale of the trial court." *Frank v. Volkswagenwerk, A.G. of West Germany,* 522 F.2d 321, 327-328, n.4 (3d Cir. 1975).

Moreover, a summary affirmance has little or no precedential value. As stated by the Third Circuit's Internal Operating Procedures ("IOPs"), a judgment order may be entered, *inter alia,* "when the panel unanimously determines . . . that a written opinion would have no precedential value. . . ." According to the Third Circuit in *Airco,* 850 F.2d at 1031, "[t]he IOPs are thus understood to establish . . . that a judgment order resolves no more than a particular appeal. A judgment order does not bind the district courts in this Circuit (including the district from which the appeal that produced the judgment order was taken) or subsequent panels of this Court." Consequently, summary affirmances are generally not to be cited or otherwise used in unrelated actions. *Furman v. United States,* 720 F.2d 263, 264 (2d Cir. 1983).

Thus, the Judgment Order in this case, which neither sets forth the Third Circuit's reasoning nor has any substantial precedential value, does not and cannot state any principles of law in conflict with the standards adopted by other Circuits in Rule 41(a)(2) cases. Rather, the Judgment Order indicates only that the Third Circuit believed that the district court's result was correct.

Moreover, the Township's implication that the Judgment Order reflects the Third Circuit's adoption of new Rule 41(a)(2) principles is ridiculous.[10] If the Court's intent had been to announce new principles, it would not have done so through the summary affirmance of an unreported district court decision. The Court would have either written an opinion describing those new principles or, at a minimum, explicitly adopted the district court's reasoning. Without such explicit adoption by the Third Circuit, it is misleading to suggest, as the Township does throughout its Petition, that the district court's opinion reflects a Third Circuit holding. *See Taylor v. Diznoff,* 633 F.Supp. 640, 642 (W.D. Pa. 1986) (faced with a defendant's attempt to cite a decision affirmed by judgment order, the court cautioned

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[10]The Township suggests that the Judgment Order conflicts with the Third Circuit's own opinion in *Ferguson v. Eakle,* 492 F.2d 26 (3rd Cir. 1974). For the same reasons that the Judgment Order cannot be in "conflict" with decisions of other courts, it cannot be in "conflict" with *Ferguson.* Moreover, the district court opinion affirmed by the Third Circuit is perfectly consistent with *Ferguson.* The district court imposed conditions upon the dismissal that it determined were necessary to protect the Township from legal prejudice. *Ferguson* requires nothing more.

that it is "misleading" to refer to such a decision as a "Third Circuit holding.").

Thus, the Judgment Order is simply not capable of creating a conflict with decisions of other Circuits. The Township's "conflict" argument must be rejected on that basis alone.

2. The District Court Applied Well Established Rule 41(a)(2) Principles

Even assuming *arguendo* that a judgment order was capable of conflicting with the decisions of other Circuits, the Judgment Order in this case would present no such conflict. The district court decision affirmed by the Third Circuit applied well established Rule 41(a)(2) principles in determining to grant B&W's motion for voluntary dismissal subject to various conditions. A review of the Magistrate's Report, adopted as the opinion of the district court, clearly sets forth those accepted principles.

First, the courts in all Circuits have long agreed that the decision as to whether to grant a motion for voluntary dismissal without prejudice under Rule 41(a)(2) is committed to the sound discretion of the trial court. *McCants v. Ford Motor Co., Inc.*, 781 F.2d 855, 857 (11th Cir. 1986); *Puerto Rico Maritime Shipping Authority v. Leith*, 668 F.2d 46, 51 (1st Cir. 1981); *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976). As stated in *McCants*, 781 F.2d at 857, the function of the district court is to "exercise its broad discretion under Rule 41(a)(2) to weigh the relevant equities and do justice between the parties in each case. . . ." The district court acknowledged and applied this principle. A10-11.

Second, the various Circuits have held that, in exercising its discretion under Rule 41(a)(2), the trial court is to be guided by certain tenets. The most fundamental of these tenets is that a motion for dismissal without prejudice should be granted unless the defendant would suffer "plain legal harm." As stated in *LeCompte*, 528 F.2d at 604, "[t]he basic purpose of Rule 41(a)(2) is to freely permit the plaintiff, with court approval, to voluntarily dismiss an action so long as no other party will be prejudiced." *See also Davis v. USX*

Corp., 819 F.2d 1270, 1273 (4th Cir. 1987).[11] The district court acknowledged and applied this principle. A9-11.

Third, the Circuits have recognized that the trial court is charged with insuring that the defendant is protected from legal prejudice. Toward this end, the courts have broad equitable powers under Rule 41(a)(2) to impose conditions on the dismissal to fashion and provide such protection to the defendant as the court feels proper. As stated by the court in *McCants*, 781 F.2d at 857, the lower court must "impos[e] such costs and [attach] such conditions for the dismissal as are deemed appropriate" to do justice between the parties. Further, the Circuits have agreed that the decision as to whether to impose conditions, and the precise nature of those conditions, is committed to the district court's sound discretion. *Puerto Rico Maritime*, 668 F.2d at 51 (1st Cir. 1981); *McCants*, 781 F.2d at 857. The district court recognized and applied this principle. A10-15.

Indeed, as discussed above, the district court imposed five specific conditions on the dismissal of this action without prejudice. These conditions, *inter alia*, prohibit B&W from ever operating the VRSF's incinerator in Parks Township and direct that B&W comply with all of the Ordinance's emission standards. Further, the court required that B&W pay the Township's taxable costs. The district court imposed each of these conditions, because in its judgment, these conditions would protect the Township from any legal harm.[12]

In the face of the district court's proper application of the foregoing Rule 41(a)(2) principles, the Township attempts to manufacture a

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[11]The burden is on the defendant to establish that the dismissal without prejudice would cause him legal prejudice. *See, e.g., Hamilton v. Firestone Tire and Rubber Co., Inc.*, 679 F.2d 143, 145 (9th Cir. 1982). If the defendant is unable to meet that burden, then a voluntary dismissal without prejudice must be granted. *Id. See also Bready v. Geist*, 85 F.R.D. 36, 37 (E.D. Pa. 1979).

[12]The Township makes the repeated argument in its Petition that the district court's conditions are of no value to it. That claim is preposterous. This entire lawsuit resulted from the Township's desire to prevent the incinerator from operating. That is the reason that the Township passed the Ordinance in the first place. By prohibiting the incinerator's operation forever, the conditions gave the Township precisely what it had wanted when it enacted the Ordinance. Moreover, the conditions require B&W to abide by the Ordinance's unconstitutional emission standards and pay the Township's costs. The only thing that the conditions did not provide were the attorneys' fees desired by the Township's counsel.

conflict by attacking the district court's decision not to award attorneys' fees and by isolating and challenging various passages of the Report. Both attempts fail.

First, the Township's argument that the district court's failure to award attorneys' fees to the Township conflicts with the decisions of all other Circuits is simply wrong. The courts have recognized that they are under no obligation to grant a defendant his attorneys' fees when dismissing an action without prejudice. *See Puerto Rico Maritime*, 668 F.2d at 51;[13] *Bready v. Geist*, 85 F.R.D. at 37; *Southeastern Pennsylvania Transportation Authority v. American Universal Insurance Co.*, No. 87-0919 (available on Lexis) (E.D. Pa. March 2, 1988); *Blackburn v. City of Columbus*, 60 F.R.D. 197 (S.D. Ohio 1973); *SBM Wageneder Gesellschaft, M.B.H. v. American Arbitration Association*, 113 F.R.D. 659 (D.D.C. 1987).

Moreover, imposition of such fees would have been particularly inappropriate in this case for two reasons. One, the Township has paid virtually no attorneys' fees in this case. Specifically, the Township's counsel, in seeking an extension of discovery, admitted to the district court that he was representing the Township on a "*pro bono* fee basis."[14] R. 530. Thus, despite the Township's claim that it has incurred $300,000 of attorneys' fees, the reality is that the Township

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[13]For example, in *Puerto Rico Maritime*, the court observed:

> This litigation has provoked what appears to be considerable hostility among the parties, and both the plaintiff and the defendant have accused the other of improper behavior. Given these material allegations of abuse of the discovery process, we hesitate to second-guess the district judge's determination that each party should bear its own costs. *Therefore, we find no abuse of discretion in the court's failure to impose any terms or conditions when it granted the plaintiff's motion for voluntary dismissal.*

Puerto Rico Maritime, 668 F.2d at 51. (emphasis supplied).

[14]At oral argument before the magistrate, the Township's counsel indicated that he was expecting to be paid for his services. Although admitting that "pro bono basis" indicates representation for free, the Township's counsel attempted to explain away his prior representation to the district court by asserting that "pro bono fee basis" means something different "in [his] circle of lawyers. . . ." B&W has not found a single case recognizing a distinction between pro bono basis and pro bono fee basis and submits that there is none.

has not paid, and does not have to pay, those fees.[15] B&W has found no case decided under Rule 41(a)(2) where a defendant has been awarded attorneys' fees that it never paid. The purpose of Rule 41(a)(2) is to protect a defendant, not to give the defendant (much less its lawyer) a financial windfall.[16]

Two, as the district court undoubtedly recognized, the vast majority of legal expenses arising from this lawsuit were the direct result of the Township's own obstructive tactics described above. Since B&W was required to bear the substantial expense of responding to the Township's numerous groundless filings, the lower courts appropriately concluded that B&W should not also be required to subsidize the Township's improper actions any further.

Given the circumstances of this case, the district court concluded that the imposition of legal fees was not necessary to protect the Township. That decision was wholly consistent with the Rule 41(a)(2) principles recognized by all of the Circuits. Accordingly, the Township's claim that the Third Circuit's decision creates a conflict with other Circuits regarding legal fees must be rejected.

The Township further attempts to manufacture a "conflict" between the decision below and other Circuits by isolating and attacking various portions of the Magistrate's Report. For example, the Township argues that the district court's decision not to award

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[15]Proof of this fact may be found in the Township's annual budgets for the years 1985 through 1988. Those budgets reflect no payment of, or even allocation for, any legal expenses in this lawsuit. R. 1621-32. Further, the Township's counsel admitted to the Magistrate that unnamed third parties had subsidized some portion of his fees.

[16]In proceedings below, the Township cited a number of decisions in which attorneys fees were awarded to a litigant who did not actually pay them and was receiving legal services on a pro bono basis. *See, e.g., Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Lab,* 842 F.2d 1436 (3d Cir. 1988); *Miller v. Apartments and Homes of New Jersey, Inc.*, 646 F.2d 101 (3d Cir. 1981). *None of these cases arose under Rule 41(a)(2).* Instead, these cases involved explicit fee shifting statutes and attorneys fees provisions designed to ensure that otherwise non-profitable cases which promote certain social policies will attract competent counsel. *See Student Public Interest,* 842 F.2d at 1449; *Pennsylvania v. Delaware Valley Citizens Counsel For Clean Air,* 478 U.S. 546, 565 (1986). The purpose of imposing terms and conditions under Rule 41(a)(2) is not to vindicate social policies, to attract competent counsel or to punish a plaintiff. The conditions are only imposed to protect the *litigant.*

attorneys' fees, in part because the Township's work product could be used in subsequent litigation, was in conflict with other Circuits' decisions. The Township cites no authority supporting this proposition. In fact, the courts consistently have held that it is inappropriate to condition a Rule 41(a)(2) dismissal on the payment of attorneys' fees if that work product is reusable in subsequent litigation. *See Bready v. Geist*, 85 F.R.D. 36, 38 (E.D. Pa. 1979); *Davis v. USX Corp.*, 819 F.2d 1270, 1276 (4th Cir. 1987).

The Township argues that the courts have declined to award the defendant attorneys' fees with respect to reusable discovery only where another action is pending between the parties. That argument misses the fundamental point. No Circuit court anywhere has attempted to impose a requirement that a defendant's attorneys' fees must be paid unless another action is pending between the parties. Whether another action is pending or likely is simply one of many factors the court may consider in exercising its discretion on the attorneys' fees issue.

The Township's other attempts to create a conflict between the Circuits by taking certain phrases of the Magistrate's Report out of context are equally unavailing. Specifically, the Township argues that the Third Circuit has adopted a new "in vain" standard and a new "bad faith by plaintiffs" rule for the imposition of legal fees. Those arguments again miss the point.

The fundamental issue before the court in considering whether to place conditions on a Rule 41(a)(2) dismissal is not whether to award attorneys' fees. Rather, the fundamental inquiry is what conditions, if any, are necessary to ensure that the defendant does not suffer "legal prejudice" as a result of the dismissal. This is precisely the issue that the Magistrate and the district court addressed. The district court resolved this issue by imposing five substantial conditions on the dismissal. The purpose of those conditions was to cure any conceivable legal prejudice to the Township. The Third Circuit determined that the district court had not abused its discretion by imposing those conditions. This determination is consistent with the Rule 41(a)(2) cases from every other Circuit. The fact that the Township is not happy with the result reached by the lower courts in applying the standard Rule 41(a)(2) principles does not mean that

those principles were not applied. The Township's "conflict" argument must be rejected.

C. The Lower Courts' Decisions Did Not Depart From The Accepted And Usual Course Of Judicial Proceedings

Rule 17.1(a) states that another circumstance in which the Court may grant certiorari occurs when the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the lower court, as to call for an exercise of this Court's power of supervision." Apparently attempting to meet this criteria, the Township launches a series of attacks on the Magistrate, the district court and the Third Circuit. Specifically, the Township claims that the lower courts departed from the usual course of judicial proceedings: 1) by deciding the case through so-called summary proceedings; 2) by dismissing as moot various pending motions of the Township for sanctions; and 3) by "taking" the Township's property in violation of the Fourteenth Amendment through failing to award the Township attorneys' fees. In addition, the Township makes the fantastic claim that the Magistrate made recommendations in favor of B&W in hopes of getting a federal judgeship. Each of these alleged departures lacks any legal or factual foundation.

1. The Lower Courts' Alleged Summary Procedures Did Not Depart From Ordinary Judicial Procedure

The Township argues that various so-called summary procedures employed by the district court and the Third Circuit "combined to prevent the proper discharge of the judicial function. . . ." Petition at 36. The Township further claims that, as a consequence of these summary procedures, "no judge appointed for life under Article III of the Constitution has heard argument or made any reasoned, responsive decision on the issues presented in this case." *Id.* at 38. Such claims, though long on hyperbole, are completely lacking in merit.

First, the Township's suggestion that the courts have not reviewed or made considered decisions regarding its arguments ignores the entire procedural history of this matter. Following the filing of B&W's Rule 41(a)(2) motion, the Township was permitted to

file three briefs with the district court and make oral argument to the Magistrate. After conducting an independent review of the pleadings, including the objections filed by the Township, the district court decided to adopt the Magistrate's Report and granted B&W's motion for dismissal subject to the five conditions recommended by the Magistrate. A14-15. It is proper for a district court judge to "accept . . . in whole . . . the findings or recommendation made by the magistrate." 28 U.S.C. 636(b)(1). Through over 140 pages of briefs, extensive oral argument and Judge Teitelbaum's review of the pleadings, the Township was provided more than ample opportunity to have its arguments considered by the district court. The court simply did not find these arguments persuasive.

Subsequently, the Township presented two briefs to the Third Circuit, as well as a petition for reconsideration. The Third Circuit was equally unpersuaded by the Township's arguments.

This procedural history completely refutes the Township's claim that its arguments were not a given fair review by Article III judges. Indeed, the record shows that the Township had every opportunity provided by the Federal and Appellate Rules of Procedure to oppose B&W's Rule 41(a)(2) motion.

Second, the fundamental predicate of the Township's argument, i.e., that the application of so-called summary procedures of the type employed in this case departs from acceptable judicial procedure, is simply false. The Township complains about three specific alleged summary procedures: 1) the district court's failure to provide the Township a *de novo* hearing; 2) the Third Circuit's summary affirmance of the district court opinion; and 3) the failure of both courts to address each of the Township's arguments explicitly. As discussed, these complaints identify no departure from usual and proper judicial procedure.

a. The Township Was Not Deprived of Any Hearing to Which It Was Entitled

The Township repeatedly complains in its Petition that the district court failed to provide it with a *de novo* hearing to present its opposition to B&W's Rule 41(a)(2) motion. The Township argues that this alleged failure was in violation of the Federal Magistrates

Act, 28 U.S.C. §§631-639, and was, thus, a departure from the ordinary course of judicial proceedings. That claim simply misreads the statute.

Specifically, the Federal Magistrates Act requires only that the district court "make a *de novo determination* of those portions of the [magistrate's] report on specified proposed findings or recommendations to which objection is made." 28 U.S.C. §636(b)(1). (emphasis added.) The statute does not require that the court provide a *de novo hearing* to the objecting party.[17] The district court's independent review of the pleadings satisfied the Act's requirement of a *de novo* determination. *See, e.g., United States v. Raddatz*, 447 U.S. 667, 676 (1980).[18] Thus, accepted and usual judicial proceedings were followed to the letter by the district court in connection with B&W's motion for dismissal.

b. The Third Circuit's Summary Affirmance Was Not a Departure From Accepted or Usual Judicial Proceedings

Similarly, the Township argues that the Third Circuit's summary affirmance of the district court decision represents a departure from usual judicial proceedings. That claim is also without merit.

Indeed, this Court has specifically endorsed the practice of issuing summary affirmances. As stated in *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972), "[T]he courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances." Further, Rule 36 of the Federal Rules of Appellate Procedure specifically contemplates the issuance of judgment orders without opinions.[19] *See Furman v. United States*, 720 F.2d 263, 264 (2nd Cir. 1983) ("[G]iven its adoption of Appellate Rule 36, the Supreme Court has seen no

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[17]There is also no requirement under Rule 41(a)(2) that the defendant be provided a hearing. *Puerto Rico Maritime*, 668 F.2d at 51.

[18]The Township suggests that the district court's statement in its order that it conducted an independent review of the pleadings was not truthful. As with most of the Township's accusations, that charge against the district court is made without any supporting evidence whatsoever.

[19]Fed. R. App. P. 36 describes, *inter alia*, how a judgment is to be entered when an appeal is resolved by a court of appeal without opinion.

legal impediment to an appellate court's decision of an appeal without opinion.")

Moreover, contrary to the Township's suggestion, the "fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal." *Furman*, 720 F.2d at 263. *See also United States v. Baynes*, 548 F.2d 481, 483 (3d Cir. 1977). Certainly the Township has not offered any legitimate reason to doubt that the Third Circuit adequately considered the Township's appeal in this case. Indeed, the study of the Courts of Appeals cited by the Township refutes its own argument. *See* J. Cecil & D. Steinstra, *Deciding Cases Without Argument: An Examination of Four Courts of Appeals* (1987), pp. 113-132. Through interviews with the active Third Circuit judges, the authors determined that those judges themselves review the materials filed in each case in deciding whether to grant oral argument or to resolve the case in a summary fashion. The judges do not delegate this role to clerks or staff attorneys. Thus, the Third Circuit judges in this case would have reviewed the Township's briefs in deciding whether summary procedures were appropriate.

The Township offers no evidence to support its position that the Third Circuit's decision was made without giving adequate consideration to the Township's arguments. The procedural history and the Third Circuit's internal practices establish that such consideration was given and that there was no departure from usual judicial process in this case.

c. The Lower Courts Were Not Obliged to Address Explicitly Every Argument Advanced by the Township

Finally, the Township's argument that usual judicial proceedings were not followed because the lower courts did not address every one of the Township's arguments is ridiculous. Not surprisingly, the Township is unable to cite a shred of authority to support this novel argument.

B&W's motion for dismissal pursuant to Rule 41(a)(2) presented the district court with two fundamental issues: 1) should the dismissal be granted without prejudice?; and 2) if so, what terms and conditions, if any, are appropriate to impose? B&W and the Township each filed extensive briefs supporting their respective positions. Based on those briefs and its own independent legal research and review of the facts, the district court granted B&W's motion subject to five conditions. The district court, by adopting the Magistrate's Report, set forth its rationale. The court was under no obligation to address each of the arguments that the parties made. The Third Circuit, having found no abuse of discretion by the district court, was also under no requirement to explain why it was unpersuaded by the Township's sundry claims.

The Township's essential request is that this Court grant certiorari so that it may explicitly address each of the Township's arguments that the lower courts believed not worthy of comment. The Court should decline this invitation.

d. The Township's Various Summary Procedure Objections Ignore Public Policy

Finally, the Township's various summary procedure objections are contrary to sound public policy. Given the crowded state of appellate dockets, a situation resulting in large part from meritless appeals of discretionary rulings, the so-called summary procedures used in this case are invaluable tools of the federal courts. *See, e.g., Taylor,* 407 U.S. 191, 195 (1972) (Rehnquist, J. dissenting) (describing the necessity of summary affirmances in appropriate cases because of the enormous caseloads burdening the circuit courts). If the federal courts were required to grant oral argument, prepare written opinions and explicitly address each and every specious argument made with respect to each motion and appeal put before them, the federal courts would come to a grinding halt.

The lower courts in this case provided the Township with multiple opportunities to present persuasive arguments supporting its position. The Township was unable to do so. The lack of merit in its positions, not any so-called summary procedures, was the cause of the Township's inability to obtain the results it desired.

2. The District Court Did Not Depart From Accepted or Usual Judicial Process by Dismissing the Township's Other Pending Motions as Moot

The Township also suggests that the district court's dismissal of the Township's pending Rule 11, 16(f) and 37(a)(4) requests for fees and sanctions as moot upon dismissal of this action constituted a departure from usual judicial proceedings. The Township's argument lacks both a factual and legal basis.

Given the Township's failure to offer a cite, it is not clear to what Rule 11 motion it is referring. What is clear is that the lower court's decision rejects the factual predicates for any Rule 11 sanctions. Specifically, the court stated that "it cannot be reasonably argued that the plaintiff's action was totally lacking in merit," and that "it appears that the plaintiff's motion to dismiss was brought in good faith." R. 1518. Further, the district court had previously ruled that B&W's discovery efforts were proper and undertaken in good faith. These rulings effectively preclude any Rule 11 motion brought by the Township.

From a practical standpoint, the Township's Rule 37(a)(4) and Rule 16(f) motions also have been resolved against the Township. The Township's Rule 37(a)(4) motion accompanied its June 13, 1987 application for an order compelling B&W to comply with discovery requests. An award of expenses under Rule 37(a)(4), by the Rule's own terms, is only available when a motion to compel discovery is granted. The Township's motion was not. The Township continued to request this irrelevant and burdensome discovery as a condition for B&W's voluntary dismissal of this action. The district court refused to impose this condition, thereby effectively denying it. Similarly, the district court declined to grant the Township any sanctions against B&W in connection with the Township's Rule 16(f) motion.

It is clear that the district court terminated this litigation and imposed the terms and conditions it considered appropriate and fair. On those terms, the litigation is over and all other pending motions are moot. Accordingly, the relevant facts reveal that there was no departure from accepted judicial procedure.

Moreover, no legal basis exists for the Township's suggestion that, by mooting the pending motions for sanctions, the district court departed from accepted judicial process. The only case relied upon by the Township on this point, *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988), is completely inapposite. The *Muthig* court considered whether a district court retained jurisdiction to impose Rule 11 sanctions following a voluntary dismissal. Here, the district court did not question its jurisdiction to impose sanctions. The district court determined that, given the circumstances described above and the conditions imposed on the dismissal, the Township's pending motions were moot. That determination was correct and in accord with usual judicial process.

3. The Township's "Taking" Claim is Frivolous

The Township's novel argument that it has been deprived of a property right by the court's failure to impose the Township's requested conditions is frivolous. The Petition fails to cite any legal support for this new constitutional claim. Moreover, the notion that a defendant could have a property right in a court's discretionary award of attorneys' fees under Rule 41(a)(2) expands the frontiers of the Township's unsupportable arguments to new limits.

In addition, the Township's claim may not even be properly presented to this Court because it was not raised below. *E.E.O.C. v. Federal Labor Relations Auth.*, 476 U.S. 19 (1986); *California v. Taylor*, 353 U.S. 553 (1957). In any event, the Third Circuit's decision does not create a conflict with any other Circuit on the basis of the Township's "taking" claim.

4. The Township's Charges Against the Magistrate's Integrity Have No Basis

Unable to proffer any legitimate argument that the lower courts departed from normal judicial procedure, the Township launches a broad based attack on the integrity of the Magistrate. Specifically, the Township makes the outlandish accusation that the Magistrate made recommendations in favor of B&W so that Attorney General Richard Thornburgh, a former member of the undersigned law firm, would recommend the Magistrate for appointment to the federal bench.

The Township does not offer a scintilla of evidence to support this incredible charge. Moreover, the Township's counsel was apparently so unconcerned that there be any factual basis for this accusation that he failed to note that Mr. Thornburgh's appointment to Attorney General was not even announced until July 12, 1988, almost two full months after the Magistrate issued his May 19, 1988 Report. Further, the Township offers no explanation as to why Judge Teitelbaum would decide to adopt recommendations by the Magistrate which were improperly favorable to B&W.[20]

This is precisely the type of baseless, unsupportable claim that the Township repeatedly made before the district court which made this litigation so extremely expensive and time-consuming. Although the court threatened at various times to impose sanctions for similar behavior, it displayed endless patience toward the Township and its counsel. The Township now rewards that patience by impugning the integrity of the Magistrate without any support other than the imagination of the Township's counsel.

The fact that the Township disagrees with the district court does not provide it with a license to attack the honesty and professionalism of court personnel without justification. B&W strongly urges that the Court strike that portion of the Township's brief. *See, e.g.,* Rule 34.6.

In sum, the judicial procedures followed in this case by the lower courts were proper, permitted by applicable law and identical to the procedures followed in hundreds of courts across the country, including this Court, every day. There was no departure from usual or accepted judicial procedure. Accordingly, the Township's Petition should be denied.

D. The Petition Does Not Present An Important Question Of Federal Law

Since the Township is incapable of identifying any true conflict between the Circuits or departure from usual judicial process, it seeks

[20]The Township did not make this unbelievable claim to the district court, where it should have been addressed initially, or even to the Third Circuit. The reason is clear. The Township's counsel undoubtedly recognized that the lower courts would be more inclined to impose Rule 11 sanctions on him than this Court may in the context of a petition for writ of certiorari.

to create an allegedly important federal question for the Court's consideration. The Township claims that this Court's decision in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), has provided large corporations with the opportunity of bringing frivolous and expensive litigation against small municipalities to coerce legislative action; that B&W used that opportunity in this case to force rescission of the Ordinance; and that this Court may prevent such abuse by "bridling" judicial discretion under Rule 41(a)(2) and by requiring the payment of attorneys' fees in such a case.

This effort to create an important federal question manifestly fails. First, regardless of whether *Monell* does or does not present opportunity for abuse, the fundamental fact is that no such abuse took place in this action. From the outset of this litigation, the Township has argued that B&W's claims were frivolous and for the purpose of harassing the Township for passing the Ordinance. The trial court consistently rejected those claims. It rejected them when it denied the Township's motion to dismiss; it rejected them when it denied the Township's multiple requests for protective orders from discovery; and it rejected them when it denied the Township's request for dismissal with prejudice or attorneys' fees. Despite 3½ years of the Township's unrelenting cries of B&W abuse, neither the trial court nor the Third Circuit found any.

Second, even assuming that *Monell* presents the possibility of frivolous lawsuits being brought against municipalities, the means to control such abuses is already available to the courts. In 1983, Fed.R.Civ.P. 11 was amended to give the courts additional authority to police and punish parties for commencing or prosecuting lawsuits in bad faith. *Stewart v. American International Oil & Gas Co.*, 845 F.2d 196, 201 (8th Cir. 1988); *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1536-38 (4th Cir. 1986). This Court, thus, need not restructure Rule 41(a)(2) or limit the discretion it grants to the courts to protect municipalities from potential abuse by large corporations. Rule 11 already provides the courts ample authority to prevent such abuse.

Finally, its proffered spectre of rampant corporate tyranny notwithstanding, the Township has offered no evidence or persuasive

argument that this potential for abuse under *Monell* presents an important issue of federal law. The Township (or at least its counsel) is not satisfied with the Third Circuit's decision in this case. That dissatisfaction, however acute, neither has implications for other Rule 41(2)(2) cases nor does it give rise to an important federal question which demands this Court's consideration. The Township's *Monell* argument must be rejected.

The Township also claims that reviewing this action will provide the Court with the chance to bring order and predictability to Rule 41(a)(2) decisions generally. However, the Township fails to make any showing that there is a need for more order or predictability under Rule 41(a)(2). The Township cites to no cases or other authorities which identify problems in the application of Rule 41(a)(2). Rule 41(a)(2) is not broken; it does not need to be fixed. Moreover, since the lower courts' decisions are completely consistent with the Rule 41(a)(2) principles applied by other courts, this case does not provide the basis for reviewing those principles to establish additional uniformity or predictability.

Finally, as Justice Brennan has pointed out, the application of a federal rule of civil procedure to a particular set of facts does not raise a question of importance for the Court's review:

> [O]rdinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where . . . the question is one that concerns the judgment of the District Judge in relation to a particular set of facts.

Appalachian Power Co. v. American Institute of Certified Public Accountants, 80 S. Ct. 16, 18 (1959).

The Township's important federal question claim, like its "conflict between the Circuits" and "departure from normal judicial procedure" claims, ignores the facts and applicable law and must be rejected.

E. Conclusion

The Petition fails to offer a single persuasive reason why this Court should grant certiorari. For the reasons set forth above, B&W respectfully requests that this Court deny the Township's Petition.

Respectfully submitted,

David L. McClenahan
Michael J. Lynch
Kenneth M. Argentieri

KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, Pennsylvania 15222
(412) 355-6500

Attorneys for Respondent
Babcock & Wilcox Company